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6 Attorneys for Plaintiff DC Comics

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 DC Comics,

12 Plaintiffs,

13 v.

14 Mark Towle, an individual and d/b/a
Gotham Garage, and Does 1 through 10,
15 inclusive,

16 Defendants.
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Case No. CV11-3934 RSWL (OPx)

DECLARATIONS IN SUPPORT
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Date: January 30, 2013

Time: 10:00 a.m.

Court: Hon. Ronald S. W. Lew

DECLARATION OF JAY KOGAN

I, JAY KOGAN, declare as follows:

1. I am Vice President and Deputy General Counsel, Intellectual Property and Publishing, for Plaintiff DC Comics. I have been employed by DC Comics for over twenty-one (21) years with various responsibilities, including relating to the enforcement of DC Comics' intellectual property rights. Except as otherwise expressly stated to the contrary, I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify as follows.

2. DC Comics is a New York General Partnership consisting of E.C. Publications, Inc. and Warner Communications Inc., having its principal place of business in New York, New York. DC Comics is the successor-in-interest to Detective Comics, Inc., National Comics Publications, Inc., National Periodical Publications, Inc. and DC Comics Inc. (DC Comics, National Periodical Publications, Inc. and DC Comics Inc. are individually and collectively referred to hereafter as "DC Comics.")

3. DC Comics is engaged in the business of publishing comic magazines and is among the most well-known and successful publishers of comic magazines in the world. One of DC Comics' most famous and popular characters is BATMAN. BATMAN was created for DC Comics as a work for hire and first appeared in the May 1939 issue of "Detective Comics." All right, title and interest in the BATMAN character and associated elements belong to DC Comics. Batman's creator, Robert "Bob" Kane (along with Elizabeth Sanders Kane, as administrator of his estate) has repeatedly reaffirmed in writing that all right, title and interest to the BATMAN character and associated elements are owned by DC Comics.

4. BATMAN has appeared in numerous comic books, including comic books entitled "Detective Comics" and "Batman." Numerous related characters and other original and fanciful elements have since appeared in the BATMAN comic

1 books as well, including, but not limited to, the BAT Emblem, the BAT REP II, and
2 variations on the BAT Symbol. One famous identifiable element associated with
3 BATMAN is a high-tech extraordinary automobile identified as the BATMOBILE.
4 The BATMOBILE was originally introduced in 1941 and has undergone many
5 transformations over the years, including various versions in design and style
6 (“Batmobile Vehicles”). DC Comics is the owner of all copyright in and to various
7 comic books in which the Batmobile has appeared. DC Comics, in its own right or as
8 successor-in-interest, has at all times been and still is the sole proprietor or otherwise
9 authorized to enforce all right, title and interest in and to the copyrights of the
10 various BATMAN characters and associated elements, Batmobile Vehicles, and all
11 comic books in which any of the foregoing have appeared.



12 5. In 1965, DC Comics licensed its BATMAN property for use in
13 connection with a television series to air on the American Broadcasting Company’s
14 (“ABC”) network and to be produced by Greenway Productions, Inc. (“Greenway”)
15 and Twentieth Century-Fox Television, Inc. (“Fox”). I am informed and believe,
16 based on a September 1, 1965, agreement between Greenway, Fox and Barris
17 Kustom City (“Barris”), that Barris was commissioned to construct a version of the
18 Batmobile Vehicles for use in the 1966 television series (“1966 Batmobile”). The
19 1966 Batmobile was based on an evolution of the Batmobile Vehicles over the
20 course of the comics and included elements which had appeared in the Batmobile
21 Vehicles in the comic books. Additionally, certain specifications were outlined in the
22 agreement which were required to be included in the construction of the 1966
23 Batmobile. All right, title and interest in these specifications was retained by DC
24 Comics. Later, in 1966, DC Comics entered into an agreement with Fox, Greenway,
25 and Barris, among others, to construct and exhibit replicas of the 1966 Batmobile. In
26 that agreement, the parties all reconfirmed that “[DC Comics] is the owner of all
27 copyright, trademarks and all other rights including commercial and exploitative
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1 rights to the feature, BATMAN, and to all contents of the said feature, including the
2 Batmobile...” Moreover, DC Comics was granted exclusive merchandising rights to
3 any BATMAN-related elements featured in the 1966 television program, including
4 the 1966 Batmobile.

5 6. On October 3, 1979, DC Comics granted use of its BATMAN property
6 to Batman Productions, Inc., later known as Batfilm Productions, Inc., for use in
7 feature-length motion pictures. I am informed and believe, based on a November 14,
8 1979, agreement, that this option was ultimately transferred to Casablanca
9 Productions, Ltd. DC Comics confirmed this assignment in an agreement dated
10 January 11, 1982, with Batfilm Productions, Inc. (formerly known as Batman
11 Productions, Inc.), Polygram Pictures, Inc. and Warner Bros. Inc. (“Warner Bros.”)
12 (the successor-in-interest to Casablanca Productions, Ltd.). The October 3, 1979,
13 agreement was modified by a March 24, 1982, agreement between DC Comics and
14 Warner Bros. Inc. The October 3, 1979, was modified again by a September 9,
15 1988, agreement between Warner Bros. Inc., Batfilm Productions, Inc., Michael E.
16 Uslan, Franklin Enterprises, Ltd., and Benjamin Melniker.

17 7. Pursuant to this license, Warner Bros. produced the first of many
18 BATMAN films in 1989, entitled *Batman*. DC Comics’ license for use of its
19 BATMAN property included a license for a depiction of the Batmobile Vehicles to
20 be featured in the 1989 motion picture (“the 1989 Batmobile”). The 1989 Batmobile
21 was based on an evolution of the Batmobile Vehicles over the course of the comics. I
22 am informed and believe, based on the employment agreement and extensions of
23 Anton Furst (“Furst”), that Furst was hired by Warner Bros. Productions Limited, an
24 affiliated company of Warner Bros. Inc., to construct the 1989 Batmobile. All
25 copyright and trademark rights to the 1989 Batmobile were retained by DC Comics.
26 Certain elements of the Batmobile Vehicles which had appeared in the comic books
27 were included in the design of the 1989 Batmobile. Additionally, DC Comics was
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1 granted exclusive merchandising rights for all elements contained in the 1989 motion
2 picture.

3 8. DC Comics is the owner of various BATMAN-related trademarks,
4 including, but not limited to, BATMOBILE, the BAT Emblem, the BAT REP II,
5 BATMAN, and various stylized variations of the BAT symbol, specifically including
6  and  (collectively “the DC Comics Trademarks”). Since 1939, DC
7 Comics, or its predecessor-in-interest, has continuously used in commerce the DC
8 Comics Trademarks in connection with its comic books and merchandising as well
9 as in connection with television programs and motion pictures produced under
10 license. Among the merchandise using the DC Comics Trademarks are toys,
11 including figurines and automobiles, apparel, and household goods. Attached
12 collectively hereto as Exhibit A are examples of DC Comics’ merchandising and
13 advertising uses of the DC Comics Trademarks. DC Comics also contracted with
14 Barris to produce multiple replicas of the 1966 Batmobile, which featured the DC
15 Comics Trademarks, and exhibit them throughout the world under the DC Comics
16 Trademarks. Attached hereto as Exhibit B is a true and correct copy of a December
17 14, 1988, licensing agreement between DC Comics and Barris. Barris is required to
18 put a copyright notice in DC Comics’ name as well as trademark notices on all
19 Batmobile Vehicles. DC Comics currently licenses to Fiberglass Freaks the
20 manufacture and customization of full-size automobiles into the Batmobile Vehicles,
21 featuring the DC Comics Trademarks. Attached collectively hereto as Exhibit C are
22 true and correct marketing materials for the Batmobile Vehicles manufactured by
23 Fiberglass Freaks. DC Comics has registered the DC Comics Trademarks in various
24 classes. DC Comics, or any predecessor-in-interest, has complied in all respects with
25 the laws governing trademark. Consumers unquestionably associate BATMAN-
26 related products with DC Comics or its licensees.

1 9. I am informed and believe that Defendant operates the business Gotham
2 Garage, which specializes in the customization of automobiles into replicas of
3 automobiles featured in various motion pictures or television programs. I am
4 informed and believe that among the vehicles Defendant reproduces and distributes
5 are replicas of the 1966 Batmobile. I am also informed and believe that Defendant
6 manufactures and distributes car kits facilitating others to customize their cars into
7 replicas of the 1966 Batmobile. I am informed and believe that among the vehicles
8 Defendant reproduces and distributes are replicas of the 1989 Batmobile. I am also
9 informed and believe that Defendant manufactures and distributes car kits facilitating
10 others to customize their cars into replicas of the 1989 Batmobile. Attached
11 collectively hereto as Exhibit D is a true and correct copy of an example of
12 Defendant's marketing for his 1989 Batmobile car kits. I am informed and believe
13 that Defendant also manufactures and distributes various automobile parts and
14 accessories featuring the DC Comics Trademarks. I am informed and believe that
15 Defendant does business through the website located at www.gothamgarage.net ("the
16 Website"), to which Defendant's other websites www.gothamgarage.com,
17 www.marktowle.com and www.batmobilereplicas.com direct. The meta tags for the
18 Website include the DC Comics Trademarks. Attached hereto as Exhibit E is a true
19 and correct printout of the source code for the Website. I am informed and believe
20 that Defendant has also offered unauthorized versions of the Batmobile Vehicles for
21 sale through eBay.

22 10. Defendant produces and distributes replicas (and car kits for replicas)
23 that copy the 1966 Batmobile. Defendant's replicas of the 1966 Batmobile feature
24 the BAT Symbol. Defendant produces and distributes replicas (and car kits for
25 replicas) that copy the 1989 Batmobile. Defendant's car parts and accessories feature
26 confusingly similar likenesses of the BAT Emblem, BAT Emblem (Batman Begins),
27 BAT REP II, and the BAT Symbol. Defendant's Website and eBay listing feature
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1 many photographs of the Batmobile Vehicles copyrighted by DC Comics.
2 Defendant's Website and eBay listing refer to Defendant's replicas as
3 BATMOBILES. Defendant's Website and eBay listing use the DC Comics
4 trademarked term BATMAN. Defendant's Website and eBay listing use confusingly
5 similar likenesses of the BAT Emblem, BAT Emblem (Batman Begins), BAT REP
6 II, and the BAT Symbol.

7 11. Defendant is not authorized by DC Comics to manufacture, sell, offer
8 for sale, distribute or otherwise produce any products bearing DC Comics'
9 copyrights or trademarks. All of the products manufactured or sole by Defendant are
10 unauthorized.

11 I declare under penalty of perjury that the foregoing is true and correct.

12 Dated this 21st day of December 2012 in New York, New York.

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JAY KOGAN

DECLARATION OF WAYNE M. SMITH

I, WAYNE M. SMITH, declare as follows:

1. I am Vice President, Senior Litigation and Chief Patent Counsel, for Warner Bros. Entertainment Inc. (“WBEI”). I have been employed by WBEI and its immediate predecessor for nearly thirteen (13) years. Except as otherwise expressly stated to the contrary, I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify as follows.

2. As part of my duties, I am charged with keeping current regarding the corporate structure of Warner Bros. Entertainment Inc. and its affiliates. As part of that responsibility, I maintain in my office various notebooks of documents relating to the corporate structure of WBEI and its affiliated companies, including DC Comics and its predecessor, DC Comics Inc. I also have access to and regularly consult Time Warner Inc.’s OneWorld online corporate structure database, which contains current and historic corporate information for Time Warner Inc., its subsidiaries (including DC Comics) and affiliates.

3. Based on the corporate structure materials that I maintain and my knowledge regarding the corporate history and structure of WBEI, I can affirm that WBEI is the successor-in-interest to Warner Bros. Inc., which copyrighted and owned the 1989 motion picture *Batman*.

4. I have also reviewed WBEI’s eDocs database in connection with the production of the 1989 motion picture *Batman*. The eDocs database contains approximately 70 agreements and deal memoranda in connection with the production of the motion picture. 16 of these agreements were for services to be performed in the United Kingdom and were entered into between various actors and other talent and Warner Bros. Inc.’s United Kingdom affiliated company Warner Bros. Productions Ltd. These include, for example, an acting agreement with actor Jack

1 Palance, and a work-for-hire production agreement with Anton Furst, who was
2 retained to design a version of the Batmobile to be used in the motion picture.

3 5. All copyright and trademark rights in the BATMAN-related elements
4 featured in the 1989 motion picture, including the 1989 Batmobile, were retained by
5 DC Comics in its October 3, 1979, agreement with Batman Productions, Inc. The
6 rights were ultimately transferred to Warner Bros. Inc., as successor-in-interest to
7 Casablanca Productions, Ltd. Any agreements entered into by Warner Bros.
8 Productions Ltd., including its agreement with Furst, are limited by the rights and
9 reservations of the October 3, 1979, agreement. Additionally, Furst explicitly agreed
10 that all rights in the products produced in connection with the 1989 *Batman* motion
11 picture were the "absolute property and copyright of the company or its assignees."

12 I declare under penalty of perjury that the foregoing is true and correct.

13 Dated this 26th day of December 2012 in La Canada, California.

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17 WAYNE M. SMITH
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DECLARATION OF NICOLE L. DREY

I, Nicole L. Drey, declare as follows:

1. I am an attorney at law duly admitted to practice before the Courts of the State of California and the United States District Court for the Central District of California. I am counsel of record for Plaintiff DC Comics (“Plaintiff” or “DC Comics”) in an action styled DC Comics v. Towle. I submit this declaration in support of Plaintiff’s Motion for Summary Judgment. Except as otherwise stated to the contrary, I have personal knowledge of the following facts and, if called as a witness, I could and would competently testify as follows.

2. Attached Exhibit F are true and accurate copies of portions of the transcript from the deposition testimony of George Barris from August 8, 2012.

3. Attached Exhibit G are true and accurate copies of portions of the transcript from the deposition testimony of Jay Kogan from September 27, 2012.

4. Attached Exhibit H are true and accurate copies of portions of the transcript from the deposition testimony of Mark Towle from October 2, 2012.

5. Attached Exhibit I are true and accurate copies of portions of the transcript from the deposition testimony of Kory Geick from November 21, 2012.

6. Attached collectively as Exhibit J are true and accurate copies of Defendant Mark Towle’s Responses to Special Interrogatories From DC Comics and Defendant Mark Towle’s Supplemental Response to Request for Admissions From DC Comics.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 26th day of December 2012, at Morrison, Illinois.

/s/ Nicole L. Drey
NICOLE L. DREY